IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 378

ROY GRANT JR. doing business as NO SLEET WINDSHIELD HEATER COMPANY,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION ENTITLED PETITION TO CORRECT DIMINUTION OF RECORD

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Rules

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One cannot glean from a careful examination of the petition what is the basis for it or what purpose it would serve. Indeed, the petition is not understandable. It would appear from it that all who have had any mission in connection with the action—the District Court, its clerk and counsel—are out of step with petitioner. Intemperate language is employed and scandalous statements are embodied in the petition.

No copy of any record was served with the petition.

In view of the nature of the petition, it is deemed to be advisable to relate the nature of the action, proceedings therein and its status.

Nature of Action, Proceedings Therein and Its Status

The complaint, filed on May 14, 1945, is a long, rambling and in most part unintelligible paper. It may be said to state, among other things, a claim for alleged infringement of a patent.

In addition to respondent, petitioner named as defendants General Motors Sales Corporation—admitted to be a dissolved corporation—four law firms and certain individual attorneys. Violation of the Anti-Trust Laws and the United States Criminal Code are referred to. Attorneys named as defendants are charged to have violated the Rules of Practice of the United States Patent Office, "the Compiled Laws of Michigan 1929" and "Wisconsin Statutes".

The action was dismissed as to the individual defendants on application to the District Court.

A motion by respondent to dismiss the complaint was tendered. The District Court accorded opportunity to petitioner to file an amended complaint stating a claim for patent infringement which was served on or about July 23, 1945.

A motion with respect to the amended complaint was made by respondent and General Motors Sales Corporation. An order was sought dismissing the amended complaint as to General Motors Sales Corporation which was dissolved in January 2, 1942, to dismiss a portion of the amended complaint on the ground that it does not state a cause of action under the Anti-Trust Laws and for other relief.

The District Court of the United States for the Eastern District of Wisconsin heard and determined said motion. It filed an opinion thereon on November 13, 1945, and an order conforming thereto on November 29, 1945. The

District Court ruled that the amended complaint be dismissed as to General Motors Sales Corporation for the reason that "no attempt to state a claim" against it on which "relief could be granted" is set forth. Provisions of the amended complaint as to the Anti-Trust Laws were ordered stricken. Also ordered stricken was a reference "to a number of patents which appear on page 6 of the complaint" for the reason that "they can have no significance other than referring to the prior art, and while they might be matters of defense it is not perceived that they have any proper place in the complaint".

Provisions of paragraph 11 of the amended complaint which "seem to have no connection with the plaintiff's claim and relate to dealings between the plaintiff and various attorneys and representatives", was also ordered stricken.

A statement of paragraph 12 of the amended complaint from which "it is difficult to understand just what plaintiff is trying to allege in the nature of a claim" was also ordered stricken.

The opinion of the District Court points out that the complaint alleges that an attorney employed by respondent "swore to an oath" before another employee of respondent and that "plaintiff apparently conceives the oath to be false and in violation of the various Michigan statutes". This allegation was also ordered stricken.

Thereafter petitioner tendered a motion for judgment by default. The motion was baseless and it was denied on December 3, 1945. Respondent was directed to file its answer within twenty days.

On the following day, December 4, 1945, on the motion of the District Court, portions of the affidavit of petitioner, which was presented in support of said motion for judgment by default, were "stricken as scandalous".

Respondent's answer was served on December 15, 1945. It denies infringement and presents defenses as to the claim of infringement upon United States patent No. 1,630,921 granted on May 31, 1927 for Windshield Cleaner on the application of Jesse C. Birely. The Birely patent had expired about a year before the action was instituted. Petitioner alleges that he acquired title to this Birely patent on November 19, 1934. The issues on the claim under the expired Birely patent have not been tried.

An appeal was taken by petitioner to the United States Circuit Court of Appeals for the Seventh Circuit from portions of the said orders of November 29, 1945, December 3, 1945 and December 4, 1945, which struck from the amended complaint the allegations referred to above, directed dismissal of the complaint as to General Motors Sales Corporation, struck out the scandalous portions of the petitioner's affidavit and which directed filing of the answer of respondent to the remaining portions of the amended complaint which purport to state a claim for alleged patent infringement.

The action is pending and untried as to respondent as to the claim for alleged patent infringement upon which issue is joined.

The appeal record: Petitioner designated what he desired to have included in the record on his said appeal. Respondent filed its designation of additional portions of the record and proceedings to be included in the record on said appeal, inclusive of its answer to the patent infringement claim of the amended complaint. The appeal record is principally of the selection of petitioner.

Motion to dismiss appeal: Respondent moved in the Court of Appeals to dismiss the appeal of petitioner from the said interlocutory orders on the ground that said orders are not final but interlocutory, and not appealable. No injunction was granted or denied. The claim for alleged patent infringement was pending and not determined.

Hohorst v. *Hamburg-American Packet Co. et al.*, 148 U. S. 262 at p. 264.

By way of response to the motion to dismiss his appeal, petitioner presented to the Court of Appeals two "emergency" petitions. One was to correct the record. No particular in which the record required correction was set forth—just a bald conclusion. The other "emergency" petition was to void the motion of respondent to dismiss the appeal. Each "emergency" petition was denied.

On March 12, 1946, the Court of Appeals ordered the appeal of petitioner dismissed.

The Petition

The instant petition is entitled "Petition to Correct Diminution of Record". The petition is not related to any proceeding in this Court or in aid of any petition for writ of certiorari which is before this Court.

The Petition Should Be Denied

The petition should be denied for the reasons (I) that it is not a part of any proper proceeding in this Court and it is not in aid of any proceeding in this Court, (II) that no purpose can be served by the petition, for the record which was before the Court of Appeals may not be altered, (III) that it does not comply with the rules of this Court and (IV) that it contains scandalous matter and therefore should be stricken from the files of this Court.

We shall treat briefly with each of said points.

POINTS AND ARGUMENT

I.

The petition should be denied for the reason that it is not in any proper proceeding in this Court and it is not in aid of any proceeding in this Court.

In full effect petitioner is asking this Court to tailor the record which was before the Court of Appeals and without purpose.

The record on appeal of the petitioner to the Court of Appeals was of his selection. Respondent designated certain items to be included therein—its answer to the amended complaint joining issue as to the charge of alleged patent infringement and other papers.

A petition to this Court for writ of certiorari must be on the record which was before the Court of Appeal. This Court does not consider matters dehors the record before a Court of Appeals on petitions for writs of certiorari.

Petitioner seeks (petition, p. 2) to have the Clerk of this Court add to the record copies of patents which he identifies but which were not before the Court of Appeals and for the "substitution of exhibits or true copies contained in the sheaf of documents, accompanying this petition to this Supreme Court" (petition, p. 3).

It is idle to deal further with the instant petition as to the instances in which a "substitution" is desired. The law is clear that the record before the Court of Appeals may not be altered. The record in the Court of Appeals is of the making of petitioner. Any correction in the record had to be effected in the District Court.

The Rules of Civil Procedure for the District Courts of the United States control the settlement of any record. Rule 75(h) provides that

> "if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

Any "correction" to the record had to be made in the District Court. No application by petitioner was made to that Court. No correction was necessary.

This point amply justifies the denial of the petition.

II.

The petition would not serve any purpose, for the record before the Court of Appeals may not be altered.

The record on any petition to this Court must be upon the record which was before a Court of Appeals on which it made its determination. One may not add to or subtract from such record which was before a lower court.

In *Grame* v. *Mutual Assurance Society of Virginia,* 154 U. S. 676, this Court said when it denied motions for writs of certiorari:

> "A petition for a rehearing, filed in the court below after judgment, which has been refused, is no part of the record to be returned here with a writ of error for a review of the judgment. *Steines* v. *Franklin County,* 14 Wall. 21."

In *Maxwell Land-Grant Case,* 122 U. S. 365, this Court had before it petitions for rehearing. In its opinion it said (p. 375):

> "There is a reference in the part of the petition for a rehearing which was prepared in the office of the Commissioner of the General Land Office, to the existence of new and material evidence touching the fraudulent character of the grant, which we must suppose to have been addressed to the Secretary of the Interior and the Attorney General as reasons for obtaining a new trial if they could, and not addressed to this court as any legal foundation for reconsidering its decision. *If this court should grant a rehearing it could only be had, according to the uniform course of the court during its whole existence, upon the record now before the court as it came from the Circuit Court for the District of Colorado.*" (Italics ours.)

The record cannot be altered. Consequently the instant petition can serve no purpose and should be denied on this ground.

III.

The petition does not comply with the Rule 17 of this Court. This Rule provides that "*no certiorari* to correct diminution of the record" shall be awarded unless a printed motion therefor shall be made and the facts on which the same is founded shall be shown by affidavit. The "affidavit" comprised in the petition (p. 29) does not comply with the requirement of Rule 17. The petition is incorporated in the affidavit by reference but the petition made part of the affidavit is replete with conclusions, innuendoes, improper charges and scandalous statements. There are no substantial facts set forth therein.

Rule 17 provides that such motion shall be made on a motion day "not later than the first motion day after the expiration of sixty days from the printing of the record, unless for special cause shown the court receives the mo-

tion at a later time". The record is not before this Court. No record was served with the petition. A record (not printed) was before the Court of Appeals. Since the record has not been printed, no motion with respect thereto is sanctioned by Rule 17 of this Court.

This is another ground which merits denial of the petition.

IV.

The petition, because of the embodiment therein of scandalous matter should be stricken from the files of this Court.

In the petition (p. 3) "illegal misrepresentations" and "official neglect" are attributed to someone. Further (petition, p. 3) it is said that "certification by the clerk of the trial court" was "presumptively official, notwithstanding otherwise the obvious exhibition of capricious, tyrannical, self-executing villainies" showing "imperfect discharge of official obligations" and "certification of a false record" (petition, p. 4).

The trial judge does not escape the venom of petitioner, for he stated (petition, p. 17) that the "trial judge applied his talents to do harm and injure the plaintiff's said civil rights and the fair determination of the plaintiff's rights to his verified claim of relief".

Counsel are subjected to the vituperations of petitioner (petition, p. 18). They are charged with having "displayed despotic haughty indifferences to fairness" and "formed a two to one block unreasonably solicitous in high pressuring the trial judge, their social compact fraternity colleague."

When dealing with "criminal violations" (petition, p. 24) the clerk of the District Court is stated to have used his official office "with intentional efforts to despoil the

said plaintiff's record on appeal" and certified "to a false record" under the seal of the District Court.

The scandalous matter with which the petition is replete is ground for striking the petition from the files of this Court.

In *Green* v. *Elbert*, 137 U. S. 615, 624, this Court said when striking from the files of this Court the brief of the plaintiff:

> "We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free from scandal."

This ground alone is justification for the denial of the petition.

CONCLUSION

It is submitted that the petition is without basis in fact or in law and that it should be denied.

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